Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-865

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GREGORY LUMBER CO.,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Federal Circuit

REPLY BRIEF OF PETITIONER

EDWARD F. CANFIELD
Counsel of Record
CASEY, SCOTT & CANFIELD, P.C.
1331 Pennsylvania Avenue, N.W.
Suite 524
Washington, D.C. 20004
(202) 783-6490

For Petitioner
Gregory Lumber Co.

TABLE OF CONTENTS

Page

SUMMARY. 1

THE QUESTION OF "ASSUMPTION OF RISK". 2

COMMENTS ON THE "STATEMENT" OF THE UNITED STATES. 2

RESPONSE TO THE "ARGUMENT" OF THE UNITED STATES. 5

CONCLUSION. 9

TABLE OF AUTHORITIES CITED

CASES

Page

Brawley v. United States,
96 U.S. 168 (1877). 7

Cafall Bros. Forest Products, Inc. v. United States, 678 F.2d 1071 (Ct. Cl.), cert. denied 459 U.S. 908 (1982). 6

A. Leschen and Sons Rope Co. v. Mayflower G.M and R. Co.,
173 F. 855 (8th Cir. 1909). 10

NRM Corp. v. Hercules Inc.,
758 F.2d 676 (D.C. Cir. 1985). 6

Priebe and Sons, Inc. v. United States,
332 U.S. 407 (1947). 8

United States v. Atlantic Dredging Co., 253 U.S. 1 (1920). 6

STATUTES

Contract Disputes Act of 1978,
41 U.S.C. § 601 et seq.. 1

18 U.S.C. § 1001 et seq.. 4

OTHER AUTHORITY

U.C.C. § 1-104 (1977), Construction Against Implicit Repeal 8

U.C.C. § 2-103(1)(b) (1977), Definitions and Index of Definitions. 8

No. 87-865

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GREGORY LUMBER CO.,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Federal Circuit

REPLY BRIEF OF PETITIONER

SUMMARY

Gregory Lumber Co.'s Petition for a Writ of Certiorari traced the development of the law of contracts as it applies both to federal contracts and the stream of commerce in general. Gregory demonstrated that conflicts exist between the holdings of the Federal Circuit, this Court, other federal circuits and the courts of the various states on three significant issues governing these 12 government contracts. The United States did not address these conflicts in its Opposition.

In its Petition Gregory presented three issues for consideration by this Court. The first issue is whether the United States can disclaim its estimates of quantity while simultaneously demanding minimum bid prices at auctions with reserve. The second issue is whether the terms "more or less" and "approximately" as interpreted by this Court permit shortages in quantity as high as 50% in United States contracts. The third issue is whether the Uniform Commercial Code should be applied as a unified body of law to a contract drafted by the United States government.

The Claims Court granted the motions for summary judgment made by the United States. Gregory never received the benefit of a hearing on the evidence or a trial. The decision in this case and the precedents upon which the Claims Court relied may very well constitute the precedents for hundreds of disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. This area of federal contract law urgently needs clarification.

I. THE QUESTION OF "ASSUMPTION OF RISK"

The only issue framed by the United States in its opposing Brief repeats a comment of the Claims Court, which itself misconstrued the issue in this controversy by describing warranty disclaimers as an affirmative defense. "Assumption of risk" is a tort concept and an attempt by the United States to transform a tortious breach of contract into inappropriate legal theories of contributory negligence and assumption of risk. The United States offered no reasoning or decisions to support its theory of "assumption of risk".

II. COMMENTS ON THE "STATEMENT" OF THE UNITED STATES

The United States chose to argue the merits of the case in its Brief. It did so by selecting only certain facts from the complicated history of these cases for its arguments. The United States' choice of facts invites Gregory's comment and criticism.

The documents supplied prior to bidding and the execution of said contracts set forth timber measurements in great detail. Most timber measurements made by the United States were described as 100% cruises in the Timber Sale Notices which induced Gregory's participation in the auctions. A 100% cruise according to industry and BLM alike means that *every* tree has been counted and measured.

BLM spent thousands of hours measuring and estimating the timber on the 12 tracts for which Gregory bid. Contrary to the assertion of the United States, Opp. at 2[1],

---

1/ References to United States Brief in Opposition will hereinafter be referenced as Opp. at __.

the detailed estimates were used not only for administrative purposes, but also for establishing the minimum bid prices. By affidavits of its officers, Gregory has stated that small businesses had to rely upon the representations of BLM because they could not afford to duplicate the timber cruising by BLM foresters.

The BLM required as part of the bidding process that the bidders warrant they had examined and inspected the timber. BLM allowed only 30 days for inspection between the announcement of the sales and the actual auctions. Gregory submitted affidavits showing that 30 days was barely sufficient for inspection due to weather. There were no standards set by BLM for this examination and inspection. It was never stated by BLM that inspection entailed a duplication by bidders of BLM's cruises. BLM disclaimed all warranties in its bid documents. The exculpatory clause was inconspicuous and in fine print.

The United States is the only source of timber available for many small bidders in Western Oregon. BLM relied on the disclaimer of all warranties with the result that BLM had no obligation to deliver anything at all. In this case, timber shortages as high as 50% were approved by the decision of the Federal Circuit. The words "approximately" and "more or less" appeared repeatedly throughout the contractual documents. The effect of the words "more or less" and "approximately" will be discussed infra. The repetition of these terms would convince a reasonable merchant in the trade that the detailed estimates of timber available for harvesting were subject only to minor variations in quantity.

The lower court stated that industry had notice of BLM's practice of advertising inflated estimates of timber available. However, key documents which would have shown

the *extent* of such shortages, for the Eugene District were *not* made available to the public and were seen by Gregory only after vigorous litigation to compel their production.

In its statement of the case, Opp. at 3, the United States characterizes Gregory as "alleging" a 26% shortfall in timber recovery when compared with the "estimates" made by the personnel of the BLM. The shortfalls were set forth on reports tendered by Gregory to BLM during the performance of the contracts. Gregory's shortfall in timber recovery has heretofore been uncontradicted, and its losses or hardship were never questioned.

Gregory was required to submit a "Scale Disposition of Timber Removed Report"[2] to the contracting officer after logging was completed in each contract. App. at 132. This report summarized the amount of timber recovered by species and commercial grade, as measured by the Columbia River Scaling Bureau, an impartial third- party agency. The Columbia River Scaling Bureau is relied upon by the timber industry to provide an accurate measure of timber volume for the purpose of calculating *fair* prices for timber *after* it is harvested. BLM accepted the validity of the measurements made by the Bureau. Gregory's officers were required to swear to the accuracy of the figures in the report under criminal penalties pursuant to 18 U.S.C. § 1001. BLM, furthermore, used the figures set forth in the report

---

2/ See a sample of such a completed form at page 132 of the Joint Appendix to the Briefs of Plaintiff-Appellant Gregory Lumber Co. and Defendant-Appellee United States in the Court of Appeals for the Federal Circuit, Docket #87-1208. A copy of said Appendix was submitted to the Clerk of this Court as a lodgement on or about December 2, 1987. References to said Appendix will hereinafter be made as "App. at ____."

submitted by Gregory and sworn to by its officers to calculate a recovery ratio as set forth in BLM's "Cruise-Scale Comparison." App. at 131.

The United States in Point 2 states that an "exhaustive review" of the case was made by the lower court. Gregory submitted 55 exhibits with its supplemental opposition to the motions for summary judgment on May 19, 1986. The Claims Court discussed only two of these exhibits. There is no indication anywhere in the opinion that the affidavits sworn to by the officers of the corporation or their expert witnesses were read by the Claims Court. If the Claims Court had examined the evidence it would have known that industry never knew the extent of the shortages in timber recovery because the Cruise-Scale comparisons were never made available by BLM. Not until March 1986, after spirited litigation to compel production of documents did anyone outside of BLM gain access to the Cruise-Scale comparisons collected by BLM in Eugene, Oregon. Nevertheless, the lower court characterized these reports as "public documents" in reaching its conclusion about industry knowledge. Admittedly, they *should* have been public. BLM directed its employees to begin collection of shortage data in January 1972, but did not make the results available to the public. Eventually, industry refused to bid on 25% of the auctions because of shortfalls. App. at 140-141.

III. RESPONSE TO THE "ARGUMENT" OF THE UNITED STATES

Having asserted that the issue in this case should be framed as one of "assumption of risk," a tort concept, the United States has argued a portion of the case in chief on the merits.

1. In its first argument, the United States characterized the language of the contracts as "plain" and "unambiguous," citing *NRM Corp. v. Hercules Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985). But *NRM* stands for a more fundamental principle. That case resulted in a remand to the Trial Court for further proceedings, because "NRM should have an opportunity to present evidence bearing on the material question of the intended scope of the agreements." *Id.* at 684.

> In any event, as we have shown, courts construing similar language in federal government contracts typically have looked beyond the four corners of the agreement to determine that the parties intended to include delay and impact costs in their negotiations. *Id.* at 684.

A similar examination by the Federal Circuit here would have demonstrated that no prudent man would sign a contract in which the United States was at liberty to deliver nothing at all.[3]

The United States attempted to distinguish *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920), which was only one of the 45 precedents cited in the Petition.

3/ The United States relies on *Cafall Bros. Forest Products, Inc. v. United States*, 678 F.2d 1071 (Ct. Cl.), cert. denied 459 U.S. 908 (1982) for the proposition that Forest Service estimates are not "guarantees." Gregory never asserted that estimates were "guarantees." The issues raised by Gregory i.e., "commercial reasonableness" and application of the U.C.C. were not pleaded nor decided in *Cafall*. Nor did the *Cafall* court consider the effect on the contract of terms such as "more or less" and "approximately."

The United States failed in *Atlantic Dredging* to reveal facts just as it did so in Gregory's case. This Court reversed for reasons that should govern here. The United States in *Atlantic Dredging* attempted to divest itself of all responsibility by telling the contractor to inspect the site.[4]

2. In its second argument, the United States admits that there are previous decisions of this Court which interpreted "more or less" and "approximately" in the same way Gregory does. The United States quotes several contractual documents where the term "more or less" occurs. Nevertheless, there is a complaint that evidence of the use of the words was not produced in the Petition for Certiorari. The Joint Appendix at p. 106-109, includes portions of some of the contractual documents in which the words "more or less" and "approximately" are set forth.

In a final and defensive rationalization, the United States says: "The words 'more or less' in this context do not mean 'approximately'." Opp. at 6. No authority was cited for this gratuitous definition. But the decisions of this Court are clear in this regard[5]. The lower court never discussed or ruled on the effect of the words "approximately" or "more or less" despite pleadings by Gregory raising the issue. The United States redefines the word "approximately" so as to mean that "the purchaser must pay the full price." Opp. at 5. The idea of commercial reasonableness and "good faith" would be expunged from the law by the Federal Circuit if the Gregory decision stands.

4/ The United States in *Atlantic Dredging* argued sixty-eight years ago, as it does here, that tort law applied rather than contract law. This Court disagreed, affirming an award.

5/ See Petition at 15 *citing Brawley v. United States*, 96 U.S. 168 (1877).

3. Gregory developed the history and application of the U.C.C. as a unified body of law in its Petition at 18-30. See U.C.C. § 1-104 (1977). The United States failed to respond clearly on this point in its third argument. The United States apparently believes it should be free to select what clauses of the U.C.C. apply to federal contracts, making it a gambler's choice when the United States acts as a "merchant." *Priebe and Sons, Inc. v. United States,* 332 U.S. 407 (1947) does not stand for the conclusion represented in the Opposition. Justice Douglas in *Priebe* at 332 U.S. 407, 413-414, wrote that penalties are improper in federal contracts although levied under the guise of "liquidated damages," and further that general contract law should obtain in Federal contracts.

> "The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step,. Reversed." *Id.* at 414.

The Gregory decision is also contrary to the development of the law merchant.

4. In its fourth argument, the United States challenges Gregory's reliance upon the U.C.C. concept of a merchant's obligation to act in "good faith" as set forth in U.C.C. § 2-103(1)(b) (1977) "Definitions and Index of Definitions." The United States advances reasoning which equates a breach of the obligation of "good faith," under the U.C.C. with "bad faith." under tort law. The Federal Circuit also adopted the position that proof of malice and intention to harm were required for recovery in this case. The cases relied upon by the lower Court were

from the law of libel and slander by public officials where deliberate intent to harm must exist for recovery. The lower Court never analyzed the circumstances to determine whether or not the United States had acted in "good faith" as a "merchant." The Federal Circuit, therefore, created a legal environment in which the concepts of the U.C.C. will be applied in an arbitrary and contrived manner to contracts for the sale and purchase of goods by the United States.

The record abounds with evidence of unfairness although no hearing and no trial were allowed. It would be unreasonable and inequitable to allow the United States to demand contractual payments based upon estimates, represented to be "approximate" and "more or less," while obligating the United States to deliver nothing in return.

IV. CONCLUSION

The Federal Circuit is in conflict with this Court and other federal courts as to three issues, any one of which justifies reversal of the Federal Circuit.

If permitted to stand, this Federal Circuit decision will preclude review of future federal contract disputes where the U.C.C. should be applied to the sale and purchase of goods by the United States acting in a proprietary capacity. In a case similar to Gregory's the Eighth Circuit Court of Appeals stated almost 80 years ago:

> Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as

> prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract *A. Leschen and Sons Rope Co. v. Mayflower G.M. and R. Co.*, 173 F. 855, 857 (8th Cir. 1909).

For the above stated reasons, Gregory respectfully requests this Court to issue a Writ of Certiorari to the Court of Appeals for the Federal Circuit on issues I, II, and III, set forth in its Petition submitted November 27, 1987.

Respectfully submitted,

Edward F. Canfield
CASEY, SCOTT & CANFIELD, P.C.
Counsel of Record
For Petitioner
Gregory Lumber Company

Dated: February 16, 1988